Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

RICHARD SHUMSKY, Chief Probation Officer,
Los Angeles County,

Petitioner,

v.

EDMUND Y. CHEIN,

Respondent.

On Petition For Writ Of Certiorari
To The U.S Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

STEVE COOLEY
District Attorney of Los Angeles County
ROBERT SCHIRN
Head Deputy, Appellate Division
BRENTFORD J. FERREIRA
MATTHEW G. MONFORTON (*Counsel of Record*)
Deputy District Attorneys
320 West Temple St., Ste. 540
Los Angeles, California 90012
(213) 974-5911

Counsel for Petitioner

QUESTIONS PRESENTED

1. Does federal court deference to state court decisions required by 28 U.S.C. § 2254(d) (as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA")) apply to claims of insufficiency of the evidence under *Jackson v. Virginia*, 443 U.S. 307 (1979) (a view held by the First, Fourth, Seventh and Tenth Circuits) or may federal habeas courts continue to review such claims *de novo* (a view followed by courts in the Second, Fifth, Sixth, Eighth and Ninth Circuits) ?

2. If AEDPA applies to *Jackson* claims, was the decision by a unanimous three-member panel of the California Court of Appeal that sufficient evidence had been presented to convict Chein of perjury (a view shared by seven California Supreme Court justices, a federal magistrate judge, a federal district court judge, two of the three members of the Ninth Circuit panel, and five dissenting members of the Ninth Circuit's *en banc* court) not simply *incorrect* but *unreasonable*?

3. Because *Jackson* requires evaluating the sufficiency of the evidence "with explicit reference to the substantive elements of the criminal offense as defined by state law," did the Ninth Circuit violate AEDPA by granting habeas relief to Chein after defining the elements of California perjury law differently than did the California Court of Appeal in its decision rejecting Chein's *Jackson* claim?

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PETITION FOR WRIT OF CERTIORARI

Richard Shumsky, Chief Probation Officer for the County of Los Angeles, (the State), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's en banc majority opinion and the five-judge dissent are reported at 373 F.3d 978 (9th Cir. 2004). The Ninth Circuit panel's majority opinion and dissent are reported at 340 F.3d 786 (9th Cir. 2003). The order of the United States District Court for the Central District of California and the Report and Recommendation of the United States Magistrate Judge are unreported. The opinion of the California Court of Appeal and the order of the California Supreme Court denying Chein's petition for review are also unreported. All opinions and orders, however, are reproduced in the separately-bound Appendix (App.) to this Petition.

STATEMENT OF JURISDICTION

The Ninth Circuit, sitting en banc, granted habeas corpus relief to Edmund Chein on June 25, 2004. *Chein v. Shumsky*, 373 F.3d 978 (9th Cir. 2004); (App. A112). The jurisdiction of this Court is timely invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

1) 28 United State Code § 2254(d)

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

2) California Penal Code § 118(a)

Every person who, having taken an oath that he or she will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which the oath may by law of the State of California be administered, willfully and contrary to the oath, states as true any material matter which he or she knows to be false, and every person who testifies, declares, deposes, or certifies under penalty of perjury in any of the cases in which the testimony, declarations, depositions, or certification is permitted by law of the State of California under penalty of perjury and willfully states as true any material matter which he or she knows to be false, is guilty of perjury.

This subdivision is applicable whether the statement, or the testimony, declaration, deposition, or certification is made or subscribed within or without the State of California.

3) California Penal Code § 123

WITNESSES' KNOWLEDGE OF MATERIALITY OF HIS TESTIMONY NOT NECESSARY. It is no defense to a prosecution for perjury that the accused did not know the materiality of the false statement made by him; or that it did not, in fact, affect the proceeding in or for which it was made. It is sufficient that it was material, and might have been used to affect such proceeding.

STATEMENT OF THE CASE

I FACTS SURROUNDING CHEIN'S PERJURY CONVICTION

Respondent Edmund Chein was the treating physician for Frank and Sandra Lopez after the couple claimed to have been injured in an automobile accident. Chein later testified as an expert witness for the Lopezes in a civil suit arising from the alleged accident. (*Lopez v. Consolidated Freightway,* Los Angeles Superior Ct. case no. WEC105580.) While testifying at the trial, Chein lied as to (1) being a specialist in orthopedic surgery and (2) having only one office location at the time of trial. In a separate fraud action brought against him by a former partner, (*Kancilia v. Chein*, Los Angeles Superior Ct. case no. LC012300), Chein declared in an interrogatory response that he had received a medical degree from the American University School of Medicine in Florida. Instead, he had graduated from the American University of the Caribbean School of Medicine, located in the Caribbean.

A jury convicted Chein in a subsequent criminal trial of three counts of perjury. Cal. Pen. Code § 118. The state trial court sentenced Chein to three years of probation and 30 days in the county jail. The California Court of Appeal affirmed

Chein's conviction, (App. A1 to A28), and the California Supreme Court denied his petition for review. (App. A29.)

II THE NINTH CIRCUIT'S OPINION

Chein filed a petition for writ of habeas corpus in U.S. District Court on May 19, 1999. (App. A32.) The Honorable Arthur Nakazato, U.S. Magistrate Judge, issued a report and recommendation advising the District Court to dismiss the petition. (App. A30 to A76). The Honorable Audrey B. Collins, District Judge, adopted the report and recommendation and dismissed the petition. (App. A78).

Chein appealed to the Ninth Circuit Court of Appeals, which affirmed in a 2-1 ruling the District Court's judgment dismissing the petition. (App. A81). The Ninth Circuit later reheard the matter en banc and, in a 6-5 ruling, reversed the District Court's order. (App. A140). The en banc majority held that the State had failed to prove beyond a reasonable doubt the materiality of Chein's lies to the *Lopez* or *Kancilia* proceedings. In so holding, the majority applied to the facts of the case a different -- and far narrower -- definition of "materiality" under California perjury law than that employed by the California Court of Appeal.

Like the majority, the five-judge dissent did not apply the deferential standard of review required by 28 U.S.C. § 2254(d) (as amended by the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"))[1] to the California Court of Appeal's decision. *Chein*, 373 F.3d at 993 n.1 (O'Scannlain, J., joined by Rymer, T.G. Nelson, Rawlinson and Clifton, JJ. dissenting). This refusal, however, stemmed from the dissent's belief that the state court's decision to deny Chein's claims was not only reasonable but *correct*. *Ibid.*

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[1] All further statutory references are to Title 28 of the United States Code unless otherwise noted.

REASONS FOR GRANTING THE WRIT

I THE CIRCUITS ARE SPLIT AS TO WHICH PORTIONS OF AEDPA, IF ANY, APPLY TO A STATE PRISONER'S *JACKSON* CLAIM

When defendants claim that their convictions are based upon insufficient evidence in violation of the Due Process Clause of the Fourteenth Amendment, appellate courts on direct review determine whether "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original). Since 1996, however, splits have developed in the circuit courts as to which portions of AEDPA, if any, apply when federal habeas courts review state court denials of *Jackson* claims.

Some federal habeas courts continue reviewing *Jackson* claims by state prisoners without regard to the reasonableness of state appellate court decisions. See, *e.g*, *Farrington v. Senkowski*, 214 F.3d 237, 240-41 (2d Cir. 2000) (petitioner's *Jackson* claim reviewed *de novo* despite state appellate court's adjudication of same claim in *People v. Farrington*, 639 N.Y.S.2d 436 (1996)); *Bledsue v. Johnson*, 188 F.3d 250, 257-61 (5th Cir. 1999) (federal court acknowledged that state appellate court adjudicated insufficiency of the evidence claim on the merits but nevertheless reviewed claim *de novo*); *Clifford v. Chandler*, 333 F.3d 724, 727-28 (6th Cir. 2003), overruled on other grounds by *Wiggins v. Smith*, 539 U.S. 510 (2003) (petitioner's *Jackson* claim reviewed *de novo* despite state appellate court's adjudication of same claim in *Clifford v. Commonwealth*, 7 S.W.3d 371, 376 (Ky. 1999)); *Sexton v. Kemna*, 278 F.3d 808, 814 (8th Cir. 2002), *cert. denied*, 537 U.S. 886 (2002) (court failed to examine reasonableness of state court's decision on petitioner's *Jackson* claim despite state appellate court adjudicating claim in *State v. Sexton*, 929 S.W.2d 909, 916-17 (Mo. App.

1996)); *Davis v. Woodford*, 333 F.3d 982, 993-94 (9th Cir. 2003) (reviewing *Jackson* claim *de novo* even though California Supreme Court had previously applied *Jackson* in *People v. Davis*, 896 P.2d 119, 143 (Cal. 1995)).

Others look to the state court decision and, in accordance with AEDPA, determine whether that decision constitutes an unreasonable application of *Jackson*. See, *e.g.*, *Hurtado v. Tucker*, 245 F.3d 7, 14-15 (1st Cir. 2001), *cert. denied*, 534 U.S. 925 (2002); *Ponnupula v. Spitzer*, 297 F.3d 172, 180 (2d Cir. 2002); *Wiggins v. Corcoran*, 288 F.3d 629, 638-39 (4th Cir. 2002), overruled on other grounds *sub nom*, *Wiggins v. Smith*, 539 U.S. 510 (2003); *Santellan v. Cockrell* 271 F.3d 190, 193-96 (5th Cir. 2001), *cert. denied*, 535 U.S. 982 (2002); *Sanford v. Yukins*, 288 F.3d 855, 863 (6th Cir. 2002); *Johnson v. Bett* 349 F.3d 1030, 1034 (7th Cir 2003); *Weston v. Dormire*, 272 F.3d 1109, 1112 (8th Cir. 2001).[2]

Still others apply both *de novo* and AEDPA standards of review to *Jackson* claims. See, *e.g.*, *Bruce v. Terhune*, ___ F.3d ___, 2004 WL 1630980 at *5 (9th Cir. July 19, 2004) (though "degree of deference to state courts' resolution of sufficiency of the evidence claims is unsettled in our circuit," petitioner's claim "fails under either approach"); *Thiel v. Schuetzle*, 200 F.3d 1120, 1122 (8th Cir. 1999) ("Under either standard, we find the evidence offered at trial was sufficient to uphold Thiel's conviction").

Finally, a split exists within the Tenth Circuit as to *which* provision of AEDPA applies to *Jackson* claims because that Circuit "has never clearly settled whether we treat sufficiency of evidence issues on habeas review as a question of law or a question of fact." *Dockins v. Hines*, 374 F.3d 935, 939 (10th Cir. 2004). Thus, some Tenth Circuit courts treat *Jackson* claims as factual issues and apply subdivision (d)(2) of § 2254 to them rather than subdivision (d)(1). See, *e.g.*, *Thomas v. Gibson*, 218 F.3d 1213, 1227-29 (10th Cir. 2000).

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[2] The above-cited cases reveal apparent intra-circuit splits within the Second, Fifth, Sixth and Eighth Circuits on this issue.

This Court should resolve these splits by applying to § 2254(d) "the cardinal principle of statutory construction that we must 'give effect, if possible, to every clause and word of a statute.' " *Williams v. Taylor*, 529 U.S. 362, 404 (2000). The first part of § 2254(d) precludes habeas relief "with respect to *any claim* that was adjudicated on the merits in State court proceeds...." § 2254(d) (emphasis added). The phrase "any claim" clearly includes any *Jackson* claim adjudicated on the merits by a state court.

Section 2254(d) contains two exceptions to the general rule that federal courts may not grant habeas relief to state prisoners. The first one, § 2254(d)(1), applies to state court decisions that are either "contrary to" or an "unreasonable application of " federal law as determined by this Court. Thus, a federal court may not grant habeas relief upon a state prisoner's insufficiency of the evidence claim unless the state court's decision denying that claim was either "contrary to" or an "unreasonable application" of law as determined by this Court.[3]

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[3] The other exception, § 2254(d)(2), applies to state court decisions that are based upon an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." However, this exception is applicable to insufficiency of the evidence claims only if such claims constitute issues of fact, a question that this Court has left unsettled. *Carmell v. Texas*, 529 U.S. 513, 547 (2000) (stating in dicta that "[s]ufficiency of the evidence rules . . . inform us whether the evidence introduced is sufficient to convict as a matter of law[.]"); *Schulp v. Delo*, 513 U.S. 298, 330 (1995) (noting in dicta that "[u]nder *Jackson*, the question whether the trier of fact has power to make a finding of guilt requires a binary response: either the trier of fact has power as a matter of law or it does not."); *Griffin v. United States*, 502 U.S. 46, 59 (1991) (noting in dicta that " 'legal error' includes inadequacy of the evidence – namely when the phrase is used as a term of art to designate those mistakes that it is the business of judges (in jury cases) and of appellate courts to identify and correct."). Thus, clear guidance from this Court is needed not only as to the applicability of AEDPA to *Jackson* claims, but also as to *which* of the two exceptions in § 2254(d) should serve as the appropriate standard.

This conclusion reinforces the goals Congress sought to achieve in enacting the statute:

> [I]f the federal courts continue to apply *Jackson's* "no rational trier of fact" test directly to the facts, state appellate decisions will continue to receive no deference, and the AEDPA will have had zero effect on this contentious area of habeas corpus law. . . . Congress, in short, does not want federal courts duplicating the review of state court systems.

Gomez v. Acevedo, 106 F.3d 192, 200 (7th Cir. 1997), *rev'd on other grounds sub nom, Gomez v. DeTella,* 522 U.S. 801 (1997).

Application of AEDPA to *Jackson* claims thus requires a "double dose" of deference. First, the state appellate court must determine whether any rational jury could find guilt beyond a reasonable doubt when the evidence is viewed in the light most favorable to the state. Second, a federal court must determine whether the state court's application of *Jackson* was objectively reasonable. *Cf. Yarborough v. Gentry*, ___ U.S. ___, 124 S.Ct. 1, 4 (2003) (because "deference to counsel's tactical decisions in his closing presentation is particularly important," review of a closing argument for ineffective assistance "is therefore highly deferential -- and *doubly deferential* when it is conducted through the lens of federal habeas." emphasis added).

Federal courts that still review post-1996 *Jackson* claims *de novo* either make no reference to AEDPA or hold that the "any-rational-jury" standard is so broad that no additional deference can be determinative. See, *e.g.*, *Friday v. Pitcher*, 200 F.Supp.2d 725, 740 n.10 (E.D. Mich. 2002) ("Where the evidence presented at trial was so weak that the petitioner is entitled to relief under *Jackson*, . . . a state trial or appellate court's decision upholding the defendant's conviction is objectively unreasonable."). This approach suffers at least three flaws.

First, a state court's application of *Jackson* need only be reasonable, not correct, in order to withstand scrutiny by a federal habeas court. *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003) ("[t]he 'unreasonable application' clause requires the state court decision to be more than incorrect or erroneous"). Thus, in at least some instances, federal habeas relief should be unavailable even when the state court *incorrectly* determines the evidence to be sufficient to support the conviction.

Second, AEDPA requires *more*, not less, deference by federal habeas courts to state court decisions when those decisions involve a broad standard:

> Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule's specificity. *The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations.*

Yarborough v. Alvarado, ___ U.S. ___, 124 S.Ct. 2140, 2149 (2004) (emphasis added). *Jackson's* "any-rational-jury" standard is as general a rule as they come. *Wright v. West*, 505 U.S. 277, 308 (1992) (Kennedy, J., concurring) ("by its terms [the rule in *Jackson*] provides a general standard which calls for some examination of the facts"); see also *Stewart v. Coalter*, 48 F.3d 610, 616 (1st Cir. 1995) (rejecting petitioner's *Jackson* claim because "variations in human experience suggest that one should expect a considerable range of reasonable estimates about what is likely or unlikely."). Given the added leeway AEDPA requires for state court applications of the already broad "any-rational-jury" rule, state court denials of *Jackson* claims should be virtually unassailable in federal habeas proceedings.

Third, proper application of AEDPA to a state court's decision in a *Jackson* case ensures that a federal habeas court

will apply the same definitions of the elements of the underlying state crime as applied by the state court.[4] The en banc majority's opinion in the instant matter exemplifies the confusion -- and errors -- that often result from a federal court redefining the elements of a crime when reviewing a state prisoner's *Jackson* claim. *Gomez*, 106 F.3d at 200 (noting "the extreme difficulty" in *Jackson* cases of distinguishing between "evidentiary insufficiency" and a "mistaken understanding of a state law's substantive requirements"). Such errors undermine comity between federal and state courts, as shown in the next section.

II THE CIRCUITS ARE SPLIT ON WHETHER THE DEFINITIONS OF THE ELEMENTS OF A STATE CRIME APPLIED BY A STATE COURT IN DECIDING A *JACKSON* CLAIM ARE BINDING UPON A FEDERAL HABEAS COURT HEARING THE SAME CLAIM

In *Jackson*, this Court emphasized that the "any-rational-jury" standard would not undermine a state's authority to define criminal offenses because "the standard must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law." *Jackson*, 443 U.S. at 324, n. 16. Left unanswered, however, was the question of *whose* definition of state law is authoritative, that of the state court which decides the validity of the *Jackson* claim or, instead, the definition applied by the federal habeas court which collaterally reviews the state court's judgment.

Federal courts are split on this question, a question that is often dispositive because "[e]vidence can be 'insufficient' only in relation to a rule of law." *Bates v. McCaughtry*, 934 F.2d 99, 102 (7th Cir. 1991), *cert. denied*, 502 U.S. 915 (1991). Federal habeas courts that review *Jackson* claims do

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[4] See section III, *infra*.

more than simply focus upon the quantity of evidence presented at trial. They also review -- and often redefine -- the elements of the crime applied in the prior state proceedings. See, *e.g.*, *Bledsue v. Johnson*, 188 F.3d at 260 ("federal habeas courts should *independently* analyze the governing statute. . .to measure the constitutional sufficiency of the evidence and determine what are the *essential elements* required by the *Jackson* sufficiency inquiry," emphasis added); *Gall v. Parker*, 231 F.3d 265 (6th Cir. 2000), overruled on other grounds by *Bowling v. Parker*, 344 F.3d 387 (6th Cir. 2003) (federal court found "extreme emotional distress" constitutes element of crime despite Kentucky Supreme Court previously rejecting same claim by Gall); *Cole v. Young*, 817 F.2d 412 (7th Cir. 1987) (federal court found "great bodily injury" constitutes element of Wisconsin mayhem statute despite state appellate court previously rejecting same claim by Cole); *Duffy v. Foltz*, 772 F.2d 1271, 1277 (6th Cir. 1985) (granting writ after holding that, under Michigan law, sanity was element of criminal statute).

These reinterpretations of state criminal statutes by federal habeas courts presuppose state law error by state courts. Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE, § 4033 at 469 (2d ed. 1996) (federal courts that do not regard state decisions as implicit alterations of state law assume that "the state courts have acted thoughtlessly, irrationally, or worse."). This practice is unacceptable for several reasons. First, this Court has repeatedly prohibited lower federal courts from granting habeas relief on state law grounds. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("we reemphasize that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."). Second, when a federal habeas court grants habeas relief on the basis of insufficiency of the evidence, double jeopardy principles preclude any retrial of the petitioner. *Burks v. United States*, 437 U.S. 1, 18 (1978).

Finally, federal review of state court interpretations of state substantive law stifles further development of such law.

As Judge Posner observed, a novel construction of a state statute may result from a state judge who, rather than misunderstanding state law, establishes a new line of cases and is thus a prophet of the law. *Fagan v. Washington,* 942 F.2d 1155, 1158 (7th Cir. 1991). By disregarding a state court's definitions of the elements of a crime, "the federal courts may err and fail to credit a genuine effort to construe state law." Deborah A. Jones, *Federal Review of the Evidence Supporting State Convictions,* 79 Colum. L.Rev. 1577, 1584 (1979).

In contrast to the view that federal habeas courts should be expositors of state criminal statutes when reviewing *Jackson* claims, Judge Posner contends that due process requires "the elements of a crime be proved but does not prescribe the elements, just as it entitles the holder of a property right to notice and a hearing but does not determine what is property." *Fagan*, 942 F.2d at 1158. As Judge Posner further reasoned:

> Suppose Billy Green [the murder victim] had been the name not of a human being but of a pigeon. If the state trial judge had found as a fact that Fagan had aided in the murder of a human being and was therefore guilty of murder under the accountability statute, Fagan would have had a sufficiency-of-evidence claim that he could have pressed in a federal habeas corpus proceeding after exhausting his state remedies. But if the judge had instead said that under Illinois law a pigeon is a human being, Fagan's only remedy would have been to urge the Illinois appeals courts to reverse his conviction because of the judge's erroneous interpretation of state law.

Ibid.; see also *Cole*, 817 F.2d at 428 (Easterbrook, J., dissenting) ("the state court's judgment defines state law for our purposes"). As shown below, Judge Posner's view is now mandated by the plain language of AEDPA.

III UNDER AEDPA, A STATE COURT'S DEFINITIONS OF THE ELEMENTS OF A STATE CRIME WHICH THAT COURT APPLIED TO A *JACKSON* CLAIM ARE BINDING UPON A FEDERAL HABEAS COURT HEARING THE SAME CLAIM

Even prior to the enactment of AEDPA, this Court held that lower state court decisions yield authoritative interpretations of state law:

> Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.

Hicks v. Feiock, 485 U.S. 624, 630 n.3 (1988) (citations omitted). Nevertheless, federal courts sometimes disregard lower state court rulings, particularly in diversity cases, when they are convinced that a state's high court would disagree with the lower court's analysis. See, *e.g.*, *Webco Industries, Inc. v. Thermatool Corp.*, 278 F.3d 1120, 1133 (10th Cir. 2002); *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1482 (9th Cir. 1986).

However, unlike federal courts hearing diversity actions or pre-AEDPA habeas cases, federal courts adjudicating post-AEDPA habeas cases are now bound by lower state court interpretations of the underlying state statutes. This is because federal habeas review is limited by AEDPA to the "decision" of a state court, a decision that may be successfully attacked on collateral review only if it is "contrary to" or resulted from an "unreasonable application" of *federal* law as determined by this Court, not if it is contrary to or resulted from an unreasonable application of *state* law. § 2254(d)(1). Under AEDPA, a lower state court

decision is no longer merely a "datum" to be considered along with prior state cases in ascertaining state law. That decision is now *itself* the controlling state law.

AEDPA thus profoundly narrows a federal habeas court's scope of review when a state prisoner's federal claim is intertwined with state substantive law. *Jackson* claims are a prime example. As shown earlier, a state court's decision in a *Jackson* case is the product of the elements of the state crime -- *as that state court defines those elements* -- as well as a measurement of the quantity of evidence in relation to those elements. *Bates*, 934 F.2d at 102 ("Evidence can be 'insufficient' only in relation to a rule of law"). An assessment of the reasonableness *vel non* of the state court's *Jackson* decision can be meaningful *only if* the federal court applies to the trial evidence reviewed by the state court the same legal principles -- i.e., the same legal definitions of the state criminal statute's elements -- employed by that state court. For a federal habeas court to do otherwise by employing its own definitions of those elements results in a meaningless assessment of the reasonableness of the state court decision, an assessment akin to comparing apples and oranges.

Thus, a proper application of AEDPA to *Jackson* claims by state prisoners requires a federal court to adhere to the state court's definitions of the elements of the underlying state crime even when those definitions originate from a lower state court and even when a federal court is reasonably convinced that the lower state court misconstrued state law. Chein's remedy for any alleged incorrect definitions of state law applied by the California Court of Appeal rested with the California Supreme Court, not the federal courts. [5]

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[5] Of course, state appellate courts may not interpret statutes in a manner that fails to give defendants fair notice of what conduct is prohibited. See, *e.g.*, *Bouie v. City of Columbia*, 378 U.S. 347 (1964) (granting habeas relief because interpretation of trespassing statute by South Carolina Supreme Court did not give defendants "fair warning" that their conduct was criminal). Under AEDPA, such an act would be "contrary

IV THE NINTH CIRCUIT VIOLATED AEDPA BY SUPPLYING ITS OWN DEFINITION OF THE ELEMENT OF "MATERIALITY" IN CALIFORNIA'S PERJURY STATUTE, A DEFINITION AT ODDS WITH THAT APPLIED BY THE CALIFORNIA COURT OF APPEAL WHEN THAT COURT DENIED CHEIN'S *JACKSON* CLAIM

The en banc majority's review of the California Court of Appeal's decision for reasonableness was limited to three footnotes. *Chein*, 373 F.3d at 988, n.5; *id.* at 991, n.7; *id.* at 992, n.8. As shown by the main text of the opinion, however, the majority never seriously applied AEDPA in this matter.[6] This case thus exemplifies the Ninth Circuit's "apparent inability to internalize AEDPA's strict standard of review that is a source of repeated public embarrassment." *Kennedy v. Lockyer*, 372 F.3d 1013, 1040 (9th Cir. 2004) (O'Scannlain, J., dissenting) (noting numerous summary reversals of Ninth Circuit AEDPA cases by this Court.)

The en banc majority committed another violation of AEDPA by defining the element of "materiality" under California law far more narrowly than did the California

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to" federal law, as determined in *Bouie*, thereby warranting habeas relief. Neither Chein nor the en banc majority has suggested that the California Court of Appeal committed such an error in the instant matter.

[6] *Chein*, 373 F.3d at 983 ("We therefore do not consider the question concerning the impact, if any, of AEDPA on the *Jackson* standard"); *id.* at 985 ("*We* therefore find *ourselves* looking through the eyes of rational juries everywhere (under *Jackson*) to decide how the *Lopez* and *Kancilia* juries would have evaluated Chein's credibility," emphasis added); *ibid.* ("Under *Jackson we ask* whether any rational trier of fact could have found every element of the crime...." emphasis added); *id.* at 986 ("*our inquiry*, precisely stated, is whether any rational trier of fact could find beyond a reasonable doubt that Chein's testimony. . . 'could probably have influenced the outcome' of the *Lopez* trial," emphasis added).

Court of Appeal when that court denied Chein's *Jackson* claim. While the en banc majority essentially conceded the sufficiency of the evidence as to the other elements of Chein's perjury counts, it contended that Chein's lies were not material under California perjury law and thus his conviction was not supported by sufficient evidence. The majority premised this conclusion upon defining a "material" statement as one that "*could probably* have influenced the outcome of the proceedings." *Chein*, 373 F.3d at 984-85 (emphasis added).

Had it properly applied AEDPA, the en banc majority would have adhered to the California Court of Appeal's definition of a "material" statement as one that "*might* have been used to affect [the proceeding in or for which it was made]" and employed *that* definition to its analysis of the state court's decision.[7] The majority therefore should have reviewed for reasonableness the California Court of Appeal's decision as to whether any rational criminal jury could have concluded that a civil jury *might* have been affected by Chein's lies. As shown below, the Ninth Circuit's determined efforts to evade these multiple levels of deference were in clear derogation of federal law.[8]

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[7] The word "might" is equivalent to "was possible" or "have the physical or moral opportunity to be contingently possible." BLACK'S LAW DICTIONARY 992 (6th ed. 1990). By contrast, the "could probably" standard is far stricter. *Id.* 1201 (defining "probably," *inter alia*, as "in all probability" and "likely"). Additionally, the en banc majority committed two other errors when it interpreted California's perjury statute differently than did the California Court of Appeal. First, as shown by the dissent, the en banc majority's definition of "materiality" rested upon a complete misreading of prior state cases. *Chein*, 373, F.3d at 993 n.1 (O'Scannlain, J., dissenting). Second, the majority ignored the rule that federal habeas courts should not review state law questions *at all*. *Ibid.*

[8] The state judges were not the only jurists whose analysis was excoriated by the en banc majority. The five dissenting circuit judges in this case believed the state court decision to be *correct*, not just simply reasonable, and thus felt no need to apply AEDPA's deference. *Chein*,

1 **Chein's Lie About Being A Specialist In Orthopedic Surgery *Might* Have Affected The Civil Jury's Verdict**

Chein testified during the *Lopez* trial regarding the plaintiff's alleged injuries. (App. A19). The California Court of Appeal held that Chein's lie about being a specialist in orthopedic surgery was material to the outcome of the *Lopez* case because "it related to his ability to convince the jury that his testimony was credible regarding the plaintiff's alleged injuries." (App. A19). The en banc majority, however, took issue with this obvious conclusion:

> the *Lopez* jury could not "probably" have determined a dispute regarding the relative credibility of two medical experts testifying about the need for future surgery based on the difference between Chein's actual credentials and his testimony concerning the nature of his residency training.

Chein, 373 F.3d at 987-88.

The rule in *Jackson* did not require Chein's criminal jury, however, to assume that the civil jurors seated in the *Lopez* trial possessed the same piercing logic as members of the en banc majority. Instead, Chein's criminal jury could rationally have concluded that the civil jurors, sitting on a trial where the burden of proof was upon the *Lopez* plaintiffs, *might* have found that the defense expert's specialist

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373 F.3d at 993 n.1 (O'Scannlain, J., dissenting). Thus, in chastising the California Court of Appeal for unreasonableness, the six members of the en banc majority were similarly slighting the five dissenting members of the en banc court as well as the two circuit judges on the prior Ninth Circuit panel's majority, the federal district court judge, the federal magistrate judge and the seven members of the California Supreme Court who, *without* applying AEDPA's deferential standard of review, all refused to grant Chein any post-conviction relief.

credential, when juxtaposed with Chein's lack of one, was dispositive. As the dissent cogently observed:

> ... if two doctors gave me conflicting diagnoses about my need for invasive orthopedic surgery, I know I would be more inclined to trust the opinion of the actual orthopedic surgery specialist over the doctor who practiced physical medicine and rehabilitation. I believe a rational jury could come to the same conclusion.

Chein, 373 F.3d at 994 (O'Scannlain, J., dissenting). Even assuming the en banc majority's conclusion as to the materiality of a doctor's specialization was correct, the majority never explained why the opposite conclusion arrived at by the dissent and the state court was not only incorrect but *unreasonable*.

Moreover, this analysis of the inferences which could have been drawn by the civil jury from Chein's lies demonstrates how defining "materiality" is critical to examining Chein's *Jackson* claim. Even if Chein's lack of specialization in orthopedic surgery *probably* would not have affected the civil jury, the California Court of Appeal was reasonable in concluding that a rational criminal jury could have determined that the civil jury *might* have been affected by this difference in the credentials of the opposing experts.

2. Chein's Attempt To Hide His Status As A "Professional Witness" By Claiming To Have Only One Office *Might* Have Affected The Civil Jury

The California Court of Appeal explained why Chein's lie about having only one office was material:

> The jury could reasonably conclude this false testimony was material to the outcome of the *Lopez*

> trial because it affected the jury's perception of [Chein's] qualifications. An adverse inference may be drawn from a physician's use of many offices. If a physician works out of several offices, it may appear that he handles numerous personal injury or worker's compensation cases only for purposes of lawsuits. On the other hand, if he has only one office, the inference may be drawn that the physician operates an ordinary medical practice. The foregoing falsehoods have a tendency to enhance the credibility of [Chein].

(App. A19 to A20). These conclusions were based upon testimony by Judge Robert Altman, the judge who presided over the *Lopez* trial and later testified at Chein's perjury trial:

> [A]t some point, the argument is or the image is that the doctor runs a PI [personal injury] mill and that the doctor isn't [*sic*] just in medicine just making money and that the doctor is handling all personal injuries and workmen's compensation and then churning cases through the courtroom. That's the image that the lawyer was trying to bring out as to Dr. Chein. That's why the number of locations is material to the qualifications of the doctor.

(App. at A48).

The en banc majority conceded that this testimony "arguably supports the proposition that physicians practicing out of multiple offices are more likely than single office practitioners to lie about having examined their patients." *Chein*, 373 F.3d at 991. However, it insisted that Judge Altman's testimony did not constitute "competent evidence" because "Judge Altman was neither a percipient witness nor an expert witness with regard to that question, and no rational jury would have thought otherwise." *Ibid.*

The issue of whether a statement by an expert witness goes beyond the scope of his or her expertise, however, is

one of *state* law and thus not cognizable in a federal habeas proceeding. *Estelle*, 502 U.S. at 67-68. The majority's complaint about the scope of Judge Altman's expertise is simply another example of a state law argument "appear[ing] in *Jacksonian* guise." *Bates*, 934 F.2d at 103.

This error is fatal to the en banc majority's analysis because, as the dissent notes, Judge Altman's testimony is constitutionally sufficient to support Chein's conviction under the California Court of Appeal's "might" standard:

> . . . [A] rational jury could believe that the false statement "*might* have been used to affect [the *Lopez*] proceeding," because I believe that a rational juror could conclude that Chein's false testimony, though perhaps "unrelated to an issue ... ha[d] the tendency to impeach the credibility of a witness who testified on a material issue. Chein's false testimony also may rationally be understood at least to have had a "tendency to influence the trier of fact on [the] issue" of Chein's qualification as a credible medical expert.

Chein, 373 F.3d at 997-98 (O'Scannlain, J., dissenting) (citations and footnotes omitted, emphasis added). Contrary to the majority's conclusion, the state court's analysis of this issue was not unreasonable. Indeed, it was correct.

3 Chein's Lie About The Location Of His Medical School *Might* Have Affected The Fraud Proceedings Brought Against Him By His Former Partner

Chein lied about graduating from an American medical school in answering an interrogatory propounded to him by Dr. Dirk Kancilia, a former medical partner who sued Chein in a civil fraud action. The Caribbean medical school that

Chein actually attended did not have a good reputation. (App. A67). The California Court of Appeal held as follows:

> The jurors could conclude [Chein's] interrogatory answer was material to the outcome of that case because it went to his credibility both as a party to the lawsuit and as a physician in business with Dr. Kancilia . . . .The false interrogatory answers, which could enhance defendant's credibility and stature, *might* have been used to affect the proceeding.

(App at A20, emphasis added). The en banc majority derided this theory of materiality because under it "*any* lie can be used for impeachment purposes in a fraud case if the lie is discovered, so *any* lie, including one having nothing to do with the issues in the case, would be material." *Chein*, 373 F.3d at 993 (emphasis in original).

What the majority failed to grasp is that when the state appellate court adjudicated Chein's *Jackson* claim, it had authority to hold, as a matter of state law, that a lie is material when made by a party in a discovery proceeding arising from a civil fraud action. This holding was reasonable, especially in light of other aspects of California law. For example, a fact finder in a state trial may determine the credibility of a witness based upon, *inter alia*, "his character for honesty or veracity or their opposites," the existence of "a statement made by him that is inconsistent with any part of his testimony at the hearing," "his attitude toward the action in which he testifies or toward the giving of testimony," and "any admission of untruthfulness." Cal. Evid. Code § 780.

Chein's lie in his interrogatory response would have diminished his credibility as a witness had he testified at trial or else weakened his case as a party if his lie caused him to refrain from testifying. *Cf. Talizin v. Oak Creek Riding Club*, 1 Cal.Rptr. 514, 517 (Cal.Ct.App. 1959) (defendant's failure to testify permitted inference that her testimony would not

have been favorable to the defense). Either way, the decision of the California Court of Appeal that Chein's lie *might* have been used to affect the proceedings was reasonable.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that this Court grant its petition for certiorari.

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Respectfully submitted,

STEVE COOLEY
District Attorney of Los Angeles County

ROBERT SCHIRN
Head Deputy, Appellate Division

BRENTFORD J. FERREIRA
Deputy District Attorney

By:

MATTHEW G. MONFORTON *(Counsel of Record)*
Deputy District Attorney

320 West Temple, Ste. 540
Los Angeles, California 90012
(213) 974-5911

Counsel for Petitioner